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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE ROBINSON,

Defendant and Appellant.

B289249

Los Angeles County
Super. Ct. No. BA461110

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed as modified.

Rudolph J. Alejo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Lawrence Robinson of possession of a firearm by a felon and unlawful possession of ammunition. The trial court sentenced Robinson to 16 months in prison on each of the two counts, to run concurrently. Robinson appeals his conviction and his sentence. We affirm his conviction and modify his sentence to stay the sentence on the ammunition count.

BACKGROUND

Robinson pleaded not guilty to an amended information charging him with possession of a firearm by a felon with three priors (Pen. Code,¹ § 29800, subd. (a)(1); count 1), and unlawful possession of ammunition (§ 30305, subd. (a)(1); count 2). Robinson stipulated to a prior felony conviction.

At trial, Los Angeles Police Department Officer Gustavo Chacon testified that on September 17, 2017, he was out on patrol to monitor a vigil being held for a murdered Schoolyard Crips gang member, in a residential area near Cochran and Bangor, two-lane residential streets in the Wilshire Division. Officer Chacon was driving a silver Crown Victoria unmarked police cruiser, with a forward-facing red light and an amber light behind the driver seat area. His partner Officer Ken Izzo was in the front passenger seat, and Officer Robert Philpott was in the back seat. All three officers were in full uniform.

On the lookout for drive-by shootings or retaliation by rival gang members, the officers drove southbound from Bangor on Cochran, passing the vigil at about 11:30 p.m. A half-dozen people were at the vigil on the west side of Cochran. The scene was well lit by a street light on a post surrounded by candles and flowers, and the police car's headlights were on. Officer Chacon

¹ All subsequent statutory references are to the Penal Code.

noticed Robinson and another black man in the middle of the street, walking northwest and facing the vigil. Robinson looked in the direction of the officers, stopped, and moved his hand toward his waistband. He turned and quickly walked back toward the east side of the street. Officer Chacon pulled in front of Robinson and stopped the car.

The officers got out of the car and Officer Chacon illuminated Robinson with his police flashlight. Robinson immediately turned to face a black Mercedes parked in front of a house, and put his right hand into his waistband. He quickly removed a small silvery chrome pistol, crouched down, and made a stuffing motion toward the front passenger wheel of the Mercedes. Robinson then stood up and began to walk westbound toward Officer Izzo. Officer Chacon made a handgun motion and a handcuffing motion to alert Officer Izzo there was a gun and he should detain Robinson. Officer Izzo detained Robinson near Officer Philpott, who was standing by the police car.

A silvery chrome .22 revolver, with its grip wrapped in black duct tape, was inside the wheel area of the Mercedes. No one else was in the area near the Mercedes. Officer Izzo photographed the gun under the car, and Officer Chacon picked it up, removed four live rounds of hollow-point ammunition, and put the gun in an LAPD envelope. The gun appeared to be functional.

On cross-examination, Officer Chacon admitted the police report did not mention that he used a flashlight to illuminate Robinson. The flashlight was part of his equipment, and at night he always kept it close at hand where he could grab it. He did not know where the man with Robinson went. He did not use gloves when he picked up the gun, or preserve the gun to test

for fingerprints or DNA. Officer Chacon saw no need for fingerprinting, because he had an unobstructed view of Robinson putting the gun under the car and he had quickly removed it.

Officer Izzo testified he also saw Robinson and the other man walk to the center of the street, look in the officers' direction, and stop and head back to the east curb. The other man stopped on the curb. He was wearing tight jeans and a tight sweater, and Officer Izzo did not see any bulges and did not think he was concealing a firearm.

Robinson continued to walk southbound on the sidewalk, looking back at the police car and clutching his waistband. When the police car stopped next to him, Robinson began to walk north again, which seemed suspicious because at first he had been walking toward the vigil, then he had walked away from it, and now he had turned around again to walk away from the officers. Officer Chacon said, " 'Let's stop him,' " and the officers got out of the car. Robinson walked faster, Officer Izzo yelled at him to stop, but Robinson looked back at him and kept walking. Officer Izzo jogged after him to catch up. Robinson left the sidewalk and walked toward a black Mercedes, and crouched down by the right front passenger tire for two or three seconds. Officer Izzo could not see Robinson when he crouched down because other parked cars blocked his view. Robinson stood up, walked in front of the Mercedes, and crossed Cochran toward the west curb. Officer Chacon made a hand signal that meant a gun, and Officer Izzo told Robinson to stop two or three times. Robinson looked at him but continued to walk away, until Officer Izzo caught up to Robinson, grabbed his arm, and detained him. Officer Izzo wrote the police report and the other officers reviewed it before submission.

The defense presented no evidence.

The jury convicted Robinson on both counts. The trial court sentenced Robinson to the low term of 16 months in prison on each count, to run concurrently, awarded custody credit, and imposed fines and fees.

DISCUSSION

1. *The failure to give CALCRIM No. 372 does not require reversal*

Section 1127c states that in any criminal trial where evidence of the defendant's flight is relied upon to show his guilt, the court has a sua sponte duty to instruct the jury that flight alone after the commission of a crime "is not sufficient in itself to establish his guilt," but a fact the jury may consider and give the weight the jury determines it deserves. (*People v. Williams* (1960) 179 Cal.App.2d 487, 490-491.) CALCRIM No. 372 is consistent with section 1127c. (*People v. Price* (2017) 8 Cal.App.5th 409, 454-455.) The instruction states: "If the defendant fled . . . immediately after the crime was committed . . . , that conduct may show that [he] was aware of [his] guilt. If you conclude that the defendant fled . . . it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled . . . cannot prove guilt by itself." (CALCRIM No. 372.) "[T]he reason flight is relevant is because it may demonstrate consciousness of guilt. [Citations.] Evidence of flight has no other probative value. Certainly, then, it is not improper to inform the jury of the reason why it is asked to consider defendant's flight as a factor that might tend to indicate his guilt of the crime charged.'" (*Price*, at p. 458.)

In closing argument, the prosecutor stated: "The question is did he possess [the gun]. . . . [¶] How do we know it was on

his person? Well, Officer Chacon . . . told you that when the defendant first saw them driving down the street, he was that deer caught in the headlights, if you will, kind of look. Quickly moving away from the police.” The prosecutor continued: “We also have to show and prove beyond a reasonable doubt that the defendant knew he possessed the firearm. Well, this is common-sense stuff, right? This is what we asked you not to check at the door when you came in here, right? [¶] Use your life experiences to know that he knew he had it on him, right? Because when he saw the police, his demeanor changed. He quickly walked away, as I said, and when Officer Izzo yelled out at him to stop, he didn’t. This is all consciousness-of-guilt actions.” The prosecutor concluded: “Additionally, he didn’t stop for Officer Izzo when he had yelled at him two more times after he walked out past in front of the Mercedes and into the street again. Again, his consciousness of guilt, his actions.”

The trial court did not give a flight instruction. Robinson argues, and respondent concedes, that the prosecutor relied on Robinson’s walking away from the officers as evidence of his consciousness of guilt, and the trial court therefore should have given an instruction such as CALCRIM No. 372. We agree with respondent that we review for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1038-1039; *People v. Sheldon* (1967) 254 Cal.App.2d 174, 181.)

Robinson argues that without the flight instruction, the jury could have believed that the evidence of flight alone was sufficient to support a guilty verdict. But in this case, it is not reasonably likely that the jury believed this, or that it relied entirely on Robinson’s failure to respond to the officers’

commands to stop when it found that he possessed the gun and ammunition. The evidence of Robinson's guilt rested primarily on Officer Chacon's eyewitness testimony that Robinson reached for his waistband, removed a silvery chrome pistol, and placed the pistol by the wheel of a parked car. Officer Chacon testified he then picked up the gun from under the car and removed the ammunition. "The evidence of . . . guilt, entirely apart from the evidence regarding his flight, was overwhelming. Under these circumstances the court's failure to instruct the jury on flight could not have had any effect upon the jury's ultimate determination." (*People v. Sheldon, supra*, 254 Cal.App.2d at p. 181.) Given the state of the evidence, we see no reasonable probability that Robinson would have obtained a more favorable outcome if the flight instruction had been given. (See *People v. Williams, supra*, 179 Cal.App.2d at pp. 490-491.) The flight instruction would have strengthened, not weakened, the case against Robinson by providing an additional basis for a guilty verdict. (See *People v. Smythe* (1999) 20 Cal.4th 936, 983; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181.) Defendants often challenge the giving, not the withholding, of a flight instruction on the ground that the instruction undermines the presumption of innocence. (*People v. Price, supra*, 8 Cal.App.5th at pp. 455-457; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157-1158.)

The failure to give a flight instruction was harmless error.

2. *The prosecutor did not commit prejudicial misconduct*

In closing argument, defense counsel argued that the officers had an interest in the outcome of the case, and attempted to discredit their testimony by noting inconsistencies with the

police report and suggesting they were trying to cover up shoddy police work (“willing to fudge and manipulate”). In rebuttal, the prosecutor acknowledged she had the burden to prove Robinson’s guilt beyond a reasonable doubt, and referred to the defense argument that not all of the officers’ testimony reflected the police report: “These are all red herrings. These are all designed to say, hey, this is your reasonable doubt. If you want to go back in that jury room and decide that you have reasonable doubt because it wasn’t in the police report that Officer Chacon had his flashlight on the defendant, then do it. If that’s your reasonable doubt. [¶] But what you would be doing is essentially going against the law ‘cause that’s not reasonable. That’s not a reasonable doubt.” Defense counsel objected that misstated the law, and the court told the jury: “It’s up to the jury to determine what reasonable doubt is. What counsel argue to you, it’s argument. It’s not evidence nor is it necessarily a correct statement of the law. The state of the law is provided to you in the jury instructions.”

To establish that the prosecutor committed misconduct, Robinson must show that in the context of the entire argument and all the instructions, there was a reasonable likelihood the jury understood or applied the prosecutor’s statement in an improper or erroneous way. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

We easily reject Robinson’s claim that the statement “threatened” the jury with prosecution because the prosecutor used the words “‘against the law.’” The prosecutor did not tell the jury they could be prosecuted. That is not a reasonable interpretation of the statement, which argued to the jury that the omission of the flashlight from the police report was not sufficient

to create a reasonable doubt, and to so conclude would go against the law defining the standard. “It is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory. [Citations.] It is permissible to urge that a jury may be convinced beyond a reasonable doubt even in the face of conflicting, incomplete, or partially inaccurate accounts.” (*People v. Centeno* (2014) 60 Cal.4th 659, 672.) In addition, the trial court promptly told the jury to determine on its own what constituted a reasonable doubt by referring to the jury instructions, which fully defined the reasonable doubt standard.

No prosecutorial misconduct occurred.

3. *The court’s response to the jury question does not require reversal*

In her closing argument, defense counsel argued that the officers did nothing to corroborate their account, such as have the gun tested for fingerprints, which would have saved the jury from “a waste of time.” During deliberations, the jury sent a note asking: “Is it common practice to obtain finger prints off gun?” The trial court told counsel it planned to respond: “This information is not part of the evidence submitted to you in the case . . . and you should not consider nor speculate about the issue.” Defense counsel objected that she had argued they should consider the lack of fingerprint evidence. The court responded that the jury had asked about a different issue, whether it was common practice to obtain fingerprints, and the court believed the proposed response was specific enough. The court gave the response.

Section 1138 requires that when a jury asks questions during deliberations, the court must provide information on

points of law, and we review any section 1138 error for an abuse of discretion. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539.)

Robinson argues the response undermined his key defense of shoddy police work. We disagree. The jury did not ask whether they could take into account that no fingerprint evidence existed, but whether it was common practice for the police to test for fingerprints. The court was correct that no evidence of common police practice was before the jury. While the jury could consider that the prosecution did not produce any evidence that Robinson's fingerprints were on the gun (including Officer Chacon's explanation), it could not speculate whether that went against common police practice, as the jury heard no testimony about what common police practice was. The jury had been instructed that it was to decide what happened "only on the evidence that has been presented to you in this trial." The trial court's response was not an abuse of discretion.

4. *The sentence on count 2 must be stayed*

The trial court imposed concurrent 16-month sentences for felon in possession on count 1 and unlawful possession of ammunition on count 2. Robinson argues, and respondent concedes, that "[w]here, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) The sentence on count 2 must be stayed.

DISPOSITION

The judgment is modified by staying the concurrent sentence on count 2. The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion, and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.